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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 939

CARLOS M. AULET,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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IN THE

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on December 23, 1964.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported.[1] A copy of the said opinion is hereto attached as Appendix A.

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[1] Opinion will probably appear in 340 Federal Reporter, 2nd Series.

JURISDICTION.

The judgment of the Court below is dated December 23, 1964 and was entered on that date.

The petition of rehearing was denied on January 22, 1965.

The jurisdiction of this Court to review the judgment below is invoked under Title 28, Section 1254 (1) U. S. C. A.

QUESTIONS PRESENTED.

1. Does the defense of unlawful entrapment depend solely upon the presence or absence of predisposition of the defendant to commit offenses of the general nature of that charged in the indictment?

2. Does the defense of unlawful entrapment depend upon both the predisposition of defendant and the conduct of law enforcement officers who induced the commission of the offense charged?

3. Should the defense of unlawful entrapment vitiate conviction where defendant was predisposed to commit offenses of the general nature of that charged in the indictment, but where no question exists that law enforcement officers induced the commission of the offense charged without any knowledge of the predisposition of defendant, and where no evidence appears in the record that the officers were attempting to ensnare a *guilty* per-

son or *suspected* person by merely providing the opportunity for him to commit the offense charged?

4. Does the majority opinion in *Sherman* v. *United States*, 356 U.S. 369, 2d L. ed. 2d 848, 78 S. Ct. 819, exclude consideration of the conduct of law enforcement officers on the question of entrapment and render the defense unavailable where some evidence appears that defendant may have committed offenses of the general nature of that charged in the case against him?

5. Does the majority opinion in *Sherman* v. *United States*, 356 U.S. 369, 2 L. ed. 2d 848, 78 S. Ct. 819, conflict with the minority opinion therein? and, if so, Is not the minority opinion more sound and conducive of justice and good public policy?

6. Where inducement by law enforcement officers is clearly and without contradiction established by both Government evidence and Defense evidence, does the Government thereupon acquire the burden to introduce evidence designed to show the lawfulness of the inducement and that the offense was not a product of their own creation for the sole purpose of prosecution and punishment for that offense?

7. Is the jury's verdict that defendant was not unlawfully entrapped into commission of the offense charged, against the manifest weight of the evidence? or Did the Government sustain its burden to prove the absence of unlawful entrapment by its officers beyond a reasonable doubt?

8. Does unlawful entrapment stand in the record in this case as a matter of law?

9. Where no question exists that law enforcement officers induced the Commission of the offense charged Can and should the issue of unlawful entrapment be decided by the mere evaluation of the credibility of defendant's own testimony tending to show that the inducement was the cause and creator of the offense?

10. Is a jury instruction on the law of entrapment correct that, fairly read, tells the jury that in considering the defense of unlawful entrapment, they should consider only defendants' prior intention to violate law?

11. Should a federal Court of review hear and decide a question of the validity of an instruction where the instruction was profferred by the complaining party and not objected to by him, but where that instruction has been approved by federal judges in the District and published for the guidance of all parties to appear before them as a correct statement of law?

12. Does the Court have the power and should the Court exercise the power to suspend rules of Court barring consideration of questions on review where these questions affect substantial constitutional rights?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The pertinent provisions of the Fifth and Sixth Amendments to the United States Constitution, of Section 174, Title 21, United States Code, and the Federal Rules of Criminal Procedure are attached hereto as Appendix B.

STATEMENT OF THE CASE.

Petitioner, Defendant and Appellant in the Courts below, is charged in the indictment with having, on March 21, 1963, at Chicago, in the Northern District of Illinois, Eastern Division, fraudulently and knowingly received, concealed and facilitated the transportation and concealment of approximately 5.450 grams of heroin, a narcotic drug, which had been previously imported into the United States contrary to law, knowing the same to have been so unlawfully imported, in violation of section 174, Title 21 of the United States code. He was tried before a jury and before the Honorable J. Sam Perry, District Judge, the said trial commencing on March 4, 1964. At the close of the Government's case, the petitioner moved for a judgment of acquittal. The Court denied the motion. The petitioner thereupon took the stand in his own defense. His defense was that of unlawful entrapment into the commission of the offense charged in the indictment. A hearing was held outside the presence of jury to determine the question of admissibility of certain alleged admissions made by petitioner to the arresting agents immediately after his arrest and while in their custody and before his being taken before the Commissioner. The court admitted the evidence and the evidence was used in rebuttal. The purported admissions were that petitioner had on some undated prior occasions, purchased narcotic drugs from the same person from whom he purchased the drugs in the case at the bar. At the close of all the evidence in the case, petitioner again moved for a judgment of acquittal on the ground that the evidence established the

defense of unlawful entrapment as a matter of law. He alternatively moved for a new trial. The court denied the motions. Both the government and defense counsel tendered certain instructions to the jury and it was agreed by and between them that the objections made during a conference had before the judge's charge to the jury, would relieve counsel of the necessity for objecting after the jury was charged and that the objections then made would be considered as objections made after the charge to the jury pursuant to Rule 30 of the Federal Rules of Criminal Procedure.

The jury's verdict is that the petitioner is guilty as charged in the indictment. The court entered judgment on the verdict and committed petitioner to the custody of the Attorney General of the United States for a period of five years. Petitioner's motions for acquittal or for a new trial were denied.

The facts presented to the jury are as follows:

About 8:15 on March 21, 1963, two agents of the Federal Narcotics Bureau, Pohl and Waltz, were in a government automobile with one Angel Rosas, described by the agents as being an informer for one of the agents. They conversed. Agent Waltz and informer Rosas left the car and went into a tavern in the vicinity of Schiller Street and Leavitt Street in Chicago, Illinois. Agent Waltz and informer Rosas returned to the government car and Waltz drove Agent Pohl and Rosas near a tavern located on Cortez Street known as Mondala's Tavern. Agent Pohl entered the tavern and sat near the middle of the bar. Agent Waltz entered the tavern and sat at the farthest end of the bar near the entrance. Rosas entered the tavern and sat at the end of the bar. At about 9:30 P.M.

petitioner, Carlos Aulet, entered the tavern and sat next to Rosas at the bar. They had a short conversation and left the bar. Agent Pohl went casually and slowly to a window near the entrance to the bar and observed Rosas and petitioner Aulet having a conversation on the street outside. He saw Rosas hand some currency to Aulet. Aulet and Rosas then returned inside the tavern, sat at the bar for another while and left the bar together. Petitioner went to his car and Rosas went to an apartment building where he lived across the street. After petitioner drove away, Rosas came out of his residence and joined the agents and had conversation with them. Rosas left and the agents waited in the vicinity of Cortez Street and Nobel. At about 10:35 P.M. petitioner returned in his car to a tavern in the vicinity called Roman's Tavern at the corner of Nobel Street and Cortez. He entered the tavern, and Agent Pohl went to the door of the tavern and observed him through a glass panel. He saw petitioner go to a telephone booth and then sit at the bar near the door. He saw Rosas go away. Agent Pohl saw Rosas come out of his apartment, and saw Agent Waltz, who was across the street, approach him, and saw Rosas go away. Agent Waltz then joined Agent Pohl at the door of Roman's Tavern outside. They saw Aulet bend over between his legs at the bar and drop an object from his hands between his feet. The two agents entered the tavern, retrieved the package, and placed the petitioner under arrest. Upon examination of the package they found five tinfoil packages one of which contained a white powder.

The white powder in the packages, after subsequent tests, proved to be heroin.

From Roman's Tavern they took the petitioner to the office of the Federal Bureau of Narcotics in the New Post office Building in the City of Chicago and there questioned him.

Petitioner denied that he had ever purchased narcotics from one Mario or any other person before the purchase that he made in the case at bar (A. 28).[1] In rebuttal, Agent Waltz testified that after his arrest and while in the Bureau of Narcotics on the night in question, petitioner had stated that he had bought heroin from one Mario three or four times before, and that he had bought marijuana from him and paid $20.00 a can.

Petitioner testified that he was a material handler for Hot Point and had been so employed for approximately nine years, that he was married and had one child and two step-children. He had been a member of the Puerto Rican National Party and had been convicted upon a plea of guilty in 1954 of conspiring to overthrow the United States Government by force. He had known Angel Rosas 15 years prior to March 21, 1963, had lived in the same neighborhood with Rosas in 1948 and 1949 and had visited Rosas' home prior to 1963. He had seen Rosas on many occasions during the year or so next prior to March of 1963. In 1955, when petitioner's wife was ill Rosas' wife took care of his, petitioner's, baby.

In 1949, when he had had an automobile accident in New York, Rosas had lent him money to return to Chicago. His son had visited Rosas' home (A. 27). One

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[1] Reference to A. is to appendix used in the court below.

week prior to March 21, 1963, Rosas had asked him to obtain some narcotics for him. He had refused to do so. He had known at one time Rosas was a narcotic addict. Rosas had told him he was addicted to narcotics at the time they worked together at the Company, and once in a while, Rosas' eyes were red (A. 30). On March 19, 1963, he had met Rosas at Rosas' telephone request. Rosas had asked him if he would go with him to Hot Point the next day and help him obtain employment. On March 21, 1963, at about 7:30 P.M. Rosas telephoned him again at his home and stated that he wanted to talk about a job at Hot Point. He asked petitioner to meet him at a tavern at Nobel and Cortez. When petitioner got there he and Rosas had a drink and Rosas asked him to walk outside saying that he had something important to tell him. Rosas acted as though he were ill and he put his hand to his stomach and scratched his back. He asked petitioner if he would do him a big favor. He asked petitioner if he would obtain some narcotics for him. Petitioner had known Rosas had been an addict for 2, 3, or 5 years. When on March 21, 1963, Rosas asked him to obtain drugs, petitioner told Rosas that he didn't have enough friends who sell drugs and asked Rosas how could he help him get drugs. Rosas asked petitioner if he knew Mario and petitioner asked Rosas "Which Mario." Rosas then told him "The one that always hangs around on Division, the short one." After he gave petitioner this description, he knew the Mario that Rosas was speaking of. Rosas told petitioner that that was the man. Rosas told petitioner that he could not obtain the narcotics he needed himself because he had been arrested and the dealers wouldn't do business with him (A. 30). Rosas kept insisting that petitioner obtain the drugs for him and looked as though

he was about to vomit. Petitioner put up five minutes of argument against the request (A. 30). He pleaded with the petitioner and he reminded petitioner that he had done favors for petitioner before, and asked petitioner why he wouldn't help him now. The favor he mentioned was that when the petitioner had had the auto accident in New York in 1949, Rosas sent him some money to return to Chicago. Rosas then handed petitioner $130.00 with which he said he wanted petitioner to obtain $125.00 worth of heroin and to keep $5.00 for his traveling expenses. Petitioner had known Mario for about six months and he went to the El Sabrocito Restaurant and saw him there. He bought the drugs and went to Roman's Tavern and called Rosas, and was instructed by Rosas to place the package on the floor of the tavern. He did as he was instructed. He had never bought or sold narcotic drugs. He paid Mario $125.00 for the package that he received. He was still working at Hot Point at the time of his testimony. It was on the sidewalk outside Mondala's Tavern that Rosas scratched himself and bent over as if he were going to vomit. He had purchased the drugs for Rosas because he felt sorry for him.

Petitioner's appeal to the United States Court of Appeals for the Seventh Circuit followed and resulted in the affirming judgment of that Court sought herein to be reviewed.

REASONS FOR ALLOWANCE OF THE WRIT.

The writ should be granted for each and all of the following reasons:

1. The opinion of the Court below disposes of the defense of entrapment by the application of the subjective test of defendant's purported predisposition to commit offenses of the general nature of that charged in the indictment. It ignores the more objective test of the conduct of the law enforcement officers—their creation of the offense for no recorded or apparent reason other than to punish same.

An issue was made in the Court below of whether or not this Court's majority opinion in *Sherman* v. *United States,* 356 U.S. 369, 2 L. Ed. 2d 848, 78 S. Ct. 819, excludes the objective test, of whether or not entrapment by law enforcement officers is lawful, suggested in the separate concurring opinion of four of the nine justices. (Minority opinion authored by Justice Frankfurter) The Court below, attending only to the subjective test, decides, in effect, that the objective test is of no importance and is not the law of *Sherman.* It is respectfully submitted that the majority opinion in *Sherman* does not exclude application of the objective test but rather commands it. Nevertheless the issue is beclouded and requires and should receive clarification by this Court. The majority opinion in *Sherman* expressly states that it follows the principles pronounced by the Court in *Sorrells* v. *United States,* 287 U.S. 435, 77 L. ed. 413, 53 S. Ct. 210. *Sorrells* pays scant attention to the predisposition of the defendant

on the issue of the lawfulness of entrapment and emphasizes the creative activity of government officials which produced the offense being considered.

In *United States* v. *Owens,* 228 F. Supp. 300, Judge Youngdahl of the United States District Court for the District of Columbia held that a predisposition of defendant to use narcotics was no evidence of a predisposition to sell narcotics as charged, and citing the minority opinion in *Sherman* verbatim, held that the conduct of the law enforcement officers rendered their entrapment of defendant into commission of the sale of narcotics unlawful. Judge Youngdahl quoted that portion of the minority opinion that no matter the defendant's record or inclination to criminality certain police conduct to ensnare him into further crime is not to be tolerated in an advanced society.

In *Ryles* v. *United States,* 183 F. 2d 944, the United States Court of Appeals for the Tenth Circuit, different from the Seventh Circuit, emphasized the conduct of the law enforcement officers in inducing commission of an offense for the purpose of prosecuting one isolated crime as the reason for sustaining the defense of unlawful entrapment.

The pertinent language of *Sherman* and *Sorrells* is attached hereto as Appendix C.

2. The language of the Court below in its opinion in the case of *United States* v. *Landry,* 257 F. 2d 425 (1958) is contradictory of its holding in this case that the jury's verdict on the issue of entrapment should not be disturbed as against the manifest weight of the evidence. In *Landry* the Court below held that once it is established that law

enforcement officers induced the commission of the offense charged, the burden becomes the government's to prove beyond a reasonable doubt that the inducement was not the cause or creator of the crime.

The pertinent language of *Landry* is attached hereto as Appendix D.

In the instant case, that the offense was induced by the law enforcement officers with and by their informer Rosas was established by the Government's evidence and corroborated by petitioner. The Government offered nothing to establish that the inducement was not the cause or creator of the crime charged, unless it can be said that the rebuttal testimony of one federal agent that defendant had stated after his arrest that he had purchased drugs on prior occasions is probative of the issue. The Court below held that this rebuttal testimony "impeached" petitioner. It did not hold that it tended to establish lawful entrapment beyond a reasonable doubt but that it affected defendant's credibility. Petitioner's credibility on the question of governmental inducement was not at issue. The fact of inducement was established by the Government.

This Court should grant the Writ prayed for to dispel the confusion apparent in the Seventh and other Circuits concerning whether burden of proof to establish lawful entrapment as used in *Landry*, means burden to go forward with evidence tending to prove, or whether it means that a defendant must establish that the established inducement was unlawful, and that jury shall decide the issue solely by judging his credibility as in the instant case. In the second Circuit the Court of Appeals held, as did the Court below in *Landry*, that a Defendant had only

the burden to establish that he was induced by a decoy, acting as agent of law enforcement officials, to commit the offense charged, and that, thereupon, it became the burden of the government to establish that defendant was ready and willing without persuasion and awaiting any propitious moment to commit the offense. *United States* v. *Sherman*, 200 F. 2d 880.

3. An issue was made in the Court below of whether or not the trial Court's charge to the jury defining unlawful entrapment and prescribing the test to be used by them to determine whether the defense had been established by the evidence so as to prohibit a verdict that defendant is guilty as charged, misstates the law and deprives petitioner of due process guaranteed by the Fifth Amendment and of a fair and impartial trial by jury guaranteed by the Sixth Amendment to the United States Constitution. The challenged portion of the charge is attached hereto as Appendix E.

The Court below found that although the charge on entrapment "might have been worded differently" it contained "no misstatement of law." The Court gave two reasons for its finding no misstatement of law in the charge—1. The instruction was taken verbatim from model-Jury Instructions and Forms for Federal Criminal Cases, Mathes, 27, F. R. D. 39, 84-85, and was adopted by the Seventh Circuit Judicial Conference Committee on Jury instructions and published in "Manual on Jury Instructions in Federal Criminal Cases", 33 F. R. D. 523, 557, and—2. The essential elements of the challenged charge are in accord with the opinions of this Court in *Sherman* and *Sorrells*.

It is respectfully submitted that the challenged charge assumes facts not in evidence; suggested to the jury that unless the Federal agents themselves, as differing from the informer working as their agent, directly entrapped petitioner, he was not entitled to the defense of entrapment, plainly implied that if the jury believed that petitioner had at any time prior to the commission of the offense had an intent or purpose to violate any law the defense of entrapment was not available to him; suggests to the jury, in stating an example, that the government had reasonable grounds to believe that petitioner was a person engaged in illicit narcotics trade, where no such evidence appears in the record as a reason for the inducement of petitioner to commit the offense; suggested to the jury that the informer was a decoy to purchase narcotics from a suspected person, where no evidence exists that petitioner was suspected of anything by any person; and ignores the conduct of the law enforcement officials while directing the jury's attention only to the character and purported predisposition of petitioner.

At oral argument in the Court below it was observed by the Government's Attorney that he was not aware of any opinion of this Court of the validity of an instruction on the defense of entrapment, and no such opinion has come to the attention of petitioner. This Court should grant the writ prayed for and determine the validity of the challenged instruction in this case which is published as a model jury instruction, and which is likely to be adopted by federal Courts all over the land as it has been adopted by the Seventh Circuit. It appears to petitioner that the instruction, applied to the peculiar facts in this case, foreclosed fair consideration by a jury of the defense of entrapment.

4. The writ prayed for should be granted by this Court to review the holding of the Court below, in effect, that, if the charge on the defense of entrapment is defective as argued by petitioner, he could not be heard to challenge it on review because he proffered it and did not object to it at the trial. The instruction given in the charge is published in Jury Instructions and Forms for Federal Criminal Cases, Mathes, 27 F. R. D. 39, 84-85, and the Court below found it essentially similar to that adopted by the Seventh Circuit Judicial Conference on Jury Instructions and published in "Manual on Jury Instructions in Federal Criminal Cases", 33 F. R. D. 523, 527. It is reasonable to assume that the trial judge would have refused any different instruction on the defense of entrapment had petitioner tendered one. His attorney can hardly be held culpable for having tendered this semi-officially-approved instruction. Petitioner should not be deprived of his liberty because of its use if in fact it is erroneous and violative of his rights to due process and a fair and impartial jury trial guaranteed respectively by the Fifth and Sixth Amendments to the United States Constitution. *Simons, et al* v. *United States*, 119 F. 2d 539.

The Court below stated that no case had been brought to its attention applying the rule of "plain error" to errors invited by a defendant, and in particular to the giving of instructions at his request. No such case has come, either, to the attention of petitioner. But justice in the instant case calls for the invocation of the "plain error" rule, (Rule 52 (b) Federal Rules of Criminal Procedure 18 U.S.C.A.) or for the suspension of Rule 30 which prohibits the assignment of errors not objected to at the trial. The error was not merely invited by defendant, but was prescribed by the Court below in extra-

judicial, semi-official action, and published for the guidance of all defendants in federal criminal cases. Under these circumstances, this Court, pursuant to its power and duty to enforce Constitutional guarantees of due process of law and fair trial, should either suspend the prohibition of Rule 30 that defendant may not challenge the instruction on the defense of entrapment because he did not object to it, whether or not it invokes Rule 52 (b). The pertinent portions of Rules 30 and 52 (b) Federal Rules of Criminal Procedure appear in Appendix B attached hereto.

CONCLUSION.

For the reasons hereinabove stated the writ of certiorari prayed for should be allowed and the judgment of the Court below reversed.

Respectfully submitted,

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APPENDIX A

OPINION OF THE COURT BELOW.

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

SEPTEMBER TERM AND SESSION, 1964

No. 14702

United States of America,
Plaintiff-Appellee,

vs.

Carlos M. Aulet,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

DECEMBER 23, 1964

Before HASTINGS, *Chief Judge*, and CASTLE and SWYGERT, *Circuit Judges.*

HASTINGS, *Chief Judge.* Defendant Carlos M. Aulet was charged in an indictment with having fraudulently and knowingly received, concealed and facilitated the transportation and concealment of approximately 5.450 grams of heroin, a narcotic drug, which had previously been imported into the United States, contrary to law, knowing the same to have been so unlawfully imported, in violation of 21 U.S.C.A. § 174.

(Appendix)

He was tried before a jury and by its verdict was found guilty. He was subsequently sentenced following a judgment entered upon the jury verdict. Defendant's motions for acquittal and for a new trial were denied. He appeals from the judgment of conviction.

At the trial, defendant testified in his own behalf and raised the defense of entrapment.

Defendant asserts as grounds for reversal that under the evidence the defense of entrapment was established as a matter of law; that the jury's verdict was against the manifest weight of the evidence; that the court's instruction on entrapment was an erroneous statement of the law of entrapment and deprived him of a fair and impartial trial; and that the admission of evidence of his former conviction in 1954 of a charge of conspiracy to overthrow the government of the United States by force and violence was so highly prejudicial that it resulted in a denial of his right to a fair and impartial trial.

At the outset, we are compelled to conclude that defendant's contentions are not well taken and the judgment of conviction must be affirmed.

The evidence on the defense of entrapment was conflicting and subject to a determination of credibility by the jury. We need not set out the testimony. Defendant's version of the alleged entrapment in certain characteristics was implausible and rebutted. He was impeached by a felony conviction and prior inconsistent statements. He was shown to have had prior dealings in narcotics within the six months period prior to the transaction charged.

(Appendix)

The jury was free to disbelieve defendant's testimony on which he relied to establish the defense of entrapment as a matter of law. It was entitled to credit the testimony of the Government's witnesses. The issue, being one of credibility, was properly submitted to the jury. Under the evidence in the record in this case, we hold there is substantial and overwhelming support for the verdict of guilty. *Sherman* v. *United States,* 356 U.S. 369 (1958); *Masciale* v. *United States,* 356 U.S. 386 (1958); *Sorrells* v. *United States,* 287 U.S. 435 (1932); *United States* v. *Becton,* 7 Cir., 324 F. 2d 943 (1963).

We have carefully examined the instruction on the defense of entrapment given by the court. *This challenged instruction was proffered by defendant and given at his request and was not objected to by him.* Defendant now complains that this instruction deprived him of a fair trial and that the giving of it was "plain error" although not brought to the attention of the trial court.

Rule 30, Federal Rules of Criminal Procedure, 18 U.S.C.A. provides "* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *"

Defendant seeks to avoid the invocation of Rule 30 by relying on Rule 52(b), Federal Rules of Criminal Procedure, wherein it is provided that "* * * Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

However, no case has been brought to our attention holding that the rule of "plain error" may be applied to alleged errors invited by defendant and in particular to the giving of instructions at defendant's request. Precedent appears to support the opposite view. *United States* v. *Donovan,* 2 Cir., 242 F. 2d 61, 63 (1957); *Kahla* v. *United States,* 5 Cir., 243 F. 2d 128, 130 (1957), cert. denied, 355 U.S. 832; *Bianchi* v. *United States,* 8 Cir., 219 F. 2d 182, 194 (1955), cert. denied, 349 U.S. 915; *Hudson* v. *United States,* 4 Cir., 180 F. 2d 630 (1950), cert. denied, 339 U.S. 981.

Further, it should be noted as the Government points out in its brief, that the instruction in question was taken verbatim from the model Jury Instructions and Forms for Federal Criminal Cases, Mathes, 27 F.R.D. 39, 84-85, Instruction 4.12 (1960). It is essentially similar to that adopted by the Seventh Circuit Judicial Conference Committee on Jury Instructions under the direction of Honorable Walter J. La Buy and published under the title of "Manual on Jury Instructions in Federal Criminal Cases," 33 F.R.D. 523, 557, Instruction 5.02 (1963).

The essential elements of the challenged instruction relating to the defense of entrapment are in accord with *Sherman* v. *United States, supra,* and *Sorrells* v. *United States, supra,* and although it might have been worded differently, we find no misstatement of the law.

Under the circumstances here present, we find that defendant cannot be heard to challenge the instruction, or in the alternative, that there is no showing of plain error in the giving of the instruction.

(Appendix)

Defendant's comment that the trial court derided the defense of entrapment in a prefatory remark is without merit.

Defendant finally contends that "the presentation to the jury of evidence of defendant's prior conviction of conspiracy to overthrow the United States Government" by force, in 1954, "was unnecessary, and of itself so prejudicial to defendant that it very probably influenced the jury's verdict against defendant on the merits of the case at bar."

This evidence was brought out by defendant himself on direct examination. We find no error on the part of the court or misconduct by Government counsel in defendant's decision to tell the jury about his prior criminal record.

Further, the Government's cross-examination of defendant on his voluntary admission was not only proper but unobjected to by defendant.

Finding no prejudicial error, the judgment of conviction appealed from is affirmed.

AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The pertinent provision of the Fifth Amendment to the United States Constitution is:

> "No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *"

The pertinent provision of the Sixth Amendment to the United States Constitution is:

> "In all criminal prosecutions the accused shall enjoy the right to a * * * trial, by an impartial jury * * *"

Rule 52 (B) Federal Rules of Criminal procedure provides:

> "Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." 18 U.S.C.A.

The pertinent provision of Rule 30, Federal Rules of Criminal Procedure is:

> "* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *" 18 U.S.C.A.

(Appendix)

The portion of the United States Code upon which the cause is predicted is:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000 * * *
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury * * *" 21 U. S. C. A. Sec. 174.

APPENDIX C

From the majority opinion in *Sherman* v. *United States*, 356 U.S. 369, 2 L. Ed. 2d 848, 78 S. Ct. 819:

> "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, 'a different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.' 287 U.S. at 442. Then stealth and strategy become * * * objectionable * * *. To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal. The principles by which the Court are to make this determination were outlined in *Sorrells* * * *."

From the separate concurring opinion in *Sherman*:

> "The crucial question, not easy of answer, to which the Court must direct itself is whether the police conduct revealed in the particular case falls below standards, to which common feeling respond, for the proper use of Governmental power. For answer it is wholly irrelevant to ask if the 'intention' to commit the crime originated with the defendant or Government officers, or if the criminal conduct was a product of the 'creative activity' of law enforcement officials. Yet in the present case the Court repeats and purports to apply

these unrevealing tests * * *. The intention referred to, therefore, must be a general intention or predisposition to commit, whenever the opportunity should arise, crimes of the kind solicited and in proof of such a predisposition evidence has often been admitted to show the defendant's reputation, criminal activities, and prior disposition. The danger of prejudice in such a situation, particularly if the issue of entrapment must be submitted to the jury and dispose of by a general verdict of guilty or innocent, is evident. The defendant must either forego the claim of entrapment or run the substantial risk that, in spite of instructions, the jury will allow a criminal record or bad reputation to weigh in its determination of guilt of the specific offense of which he stands charged. Furthermore, a test that looks to the character and predisposition of the defendant rather than the conduct of the police loses sight of the underlying reason for the defense of entrapment. No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society."

From the opinion in *Sorrells* v. *United States*, 287 U.S. 435, 77 L. Ed. 413, 53 S. Ct. 210:

U. S. p. 444—

"The Federal Courts have generally approved the statement of Circuit Court Judge Sanborn in the leading case of *Butts* v. *U.S.* (C. C. A. 8th), 18 A. L. R. 143, 273 Fed. 38, Supra. as follows: 'The first duties of the officers of the law are to prevent, not to punish

crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it * * *'"

U. S. p. 451—

"The predisposition and criminal design of the defendant are relevant. But the issues raised and the evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials. If that is the fact, common justice requires that the accused be permitted to prove it!"

APPENDIX D

The pertinent language of the United States Court of Appeals for the Seventh Circuit in the case of *United States* v. *Landry*, 257 F. 2d 425, is:

"In the instant case it is not opened to doubt but that defendant was induced by Masciale to procure the heroin on the two occasions involved. Such being the case, the burden was on the government as it concedes in its Brief to prove beyond a reasonable doubt that the inducement was not the cause or the creator of the crime, or as stated by Second Circuit in *Sherman* (200 F. 2d 880-882), 'that the accused was ready and willing to commit the offense charged, whenever the opportunity was afforded'".

APPENDIX E

Trial Court's charge on the defense of entrapment:

"The accused offers the defense of unlawful entrapment as to each crime charged in this indictment. He was not required to make any defense, but he has made it, so we must consider it.

The law recognizes two kinds of entrapment. Unlawful entrapment and lawful entrapment. Where a person has no previous intent or purpose to violate the law, but is induced o persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law as a matter of policy forbids conviction in such a case.

On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that Government agents provide what appears to be a favorable opportunity is no defense, but is a lawful entrapment. One, for example, the Government has reasonable grounds for believing that a person is engaged in illicit sale of narcotics, it is not unlawful entrapment for a Government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to purchase narcotics from such suspected person.

If then the jury should find from the evidence that, before anything at all occurred respecting the alleged offense involved in the case, the accused was ready, willing and—ready and willing to commit crimes such as those charged in the indictment whenever opportun-

ity, was offered, and the Government merely offered the opportunity, the accused is not entitled to the defense of unlawful entrapment.

If, on the other hand, the jury should find the accused had no previous intent or purpose to commit any offenses of the character here charged, and did so only because he was induced or persuaded by some agent of the Government, then the prosecution has seduced an innocent person, and the defense of an unlawful entrapment is a good defense and the jury should acquit the defendant."

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 939

CARLOS M. AULET, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted by a jury, in the United States District Court for the Northern District of Illinois, of knowingly receiving and concealing unlawfully imported heroin in violation of 21 U.S.C. 174. He was sentenced to imprisonment for five years (R. 67).* The court of appeals affirmed the conviction on December 23, 1964 (Pet. App. 1a-5a). A petition for rehearing was denied on January 22, 1965. The petition

* "R." refers to the appendix filed in the court below.

for a writ of certiorari was not filed until February 26, 1965, and is therefore out of time under Rule 22-2 of the Rules of this Court. In any event, the issues raised by the petition do not merit review by this Court.

1. There is no basis for petitioner's contention that the evidence established entrapment as a matter of law. The testimony on the issue was conflicting. Petitioner testified that he was induced, through sympathy, to purchase narcotics for the special employee, Rosas, because, during their conversation outside a tavern, Rosas had exhibited withdrawal symptoms—red eyes, scratching of his back and legs, and bending over with his hands on his stomach as if to vomit (R. 26-27, 29-30). An agent who had observed the entire conversation through the tavern window testified that just before petitioner and Rosas had gone outside he had observed that Rosas' eyes were not bloodshot, and that during the discussion on the sidewalk Rosas did not scratch, hold his stomach, bend over as if to vomit, or demonstrate any other symptoms of narcotics addiction (R. 43). Moreover, the version of the facts offered by petitioner was discredited by the disclosure of his other recent dealings in narcotics (R. 44-45). The issue plainly involved a question of credibility and was properly submitted to the jury. *Masciale* v. *United States*, 356 U.S. 386, 388; *Sherman* v. *United States*, 356 U.S. 369, 377.

2. Petitioner has no ground to complain of the instructions under which the defense of entrapment was submitted. As noted by the court below (Pet.

App. 4a), the instruction is in accord with applicable decisions of this Court and contains no misstatement of law. Petitioner's general challenges to its appropriateness and accuracy (Pet. 15) are unsupported by any fair reading (Pet. App. 11a-12a; R. 53-55). Moreover, this particular instruction was given by the trial court at the specific request of petitioner, and he cannot now be heard to complain of his own choice of words.**

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
RONALD L. GAINER,
Attorneys.

MARCH 1965

** The allegedly improper propositions of law concerning the defense of entrapment, which petitioner purports to read into the decision of the court of appeals and which petitioner invites this Court to examine in a general review of the law in this area (Pet. 11-14), do not in fact appear in the opinion.

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Petitioner.

VS.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO MEMORANDUM OF RESPONDENT IN OPPOSITION.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO MEMORANDUM OF RESPONDENT IN OPPOSITION.

Petitioner, Carlos Aulet pursuant to Rule 24 (4) of this Court, replies to the Memorandum for The United States in Opposition, as follows:

1. The petition for certiorari is timely filed for the reason that no complete appealable judgment of the Court Below was entered on January 22, 1965 at the time of

the announcement of the denial of the petition for rehearing in that Court, by reason of it's own Rule 28. Rule 28 is as follows:

"Mandate"

Rule 28. (a) Issuance. Unless otherwise ordered, mandate shall issue as of course 20 days after the entry of judgment unless delayed by the filing of a petition for rehearing within that period. If such petition for rehearing be denied, mandate shall issue 5 days thereafter; if granted, no mandate shall issue until final disposition of the cause.

(b) Stay. A stay of mandate granted pending application for certiorari to the Supreme Court of the United States, shall not exceed 30 days unless extended by order of this Court or a judge thereof. However, if within such 30 days, or within any duly allowed extension thereof, there is filed with the clerk of this court a certificate of the clerk of the Supreme Court certifying that the certiorari petition, record and brief have been filed, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the writ of certiorari, the mandate shall issue.

By Rule 28 the judgment below could not become, and was not complete or effective, until five days after January 22, 1965, and the petition herein was filed within 30 days after the effective date of the denial of the petition for rehearing, pursuant to Rule 22(2) of this Court.

That, part of a court's judgment is the court's mandate, is established by the decision of this Court of the problem of when a judgment of a court of appeals be-

came final and appealable where the mandate directed further proceedings in the court below. *Rogers* v. *Hill*, N.Y., 1933, 289 U.S. 582, 587, 53 S. Ct. 731, 77 L. Ed. 731.

The Court's attention is invited to the fact that the mandate in the instant case could not issue as part of the court's judgment until five days after the date of the denial of the petition for rehearing, and that this five day period is part of the judgment of the denial of the petition.

All other contentions of Respondent are adequately answered in the petition and record filed therewith.

Respectfully submitted,

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